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IN THE

Supreme Court of the United States

TERM

No.-----

J. O. BOMER, JR.,
PETITIONER,

vs.

STATE OF TENNESSEE
On motion of Chancellor
John E. Swepston and
Chancellor Lois D. Bejach,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS AND THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

PETITION

Petitioner, J. O. Bomer, Jr., prays this Court to review on writ of certiorari a judgment of the Court of

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Appeals of the Western District of Tennessee, and the Supreme Court of Tennessee, in a case there entitled J. O. Bomer, Jr., vs State of Tennessee, on motion of Chancellor John E. Swepston and Chancellor Lois D. Bejach.

A final judgment of the Supreme Court of Tennessee was rendered September 8, 1942, when a petition for rehearing was denied. (R. 217). This Court had previously on July 25, 1942, denied a petition for rehearing (R. 216), and this Court had previously on June 27, 1942, denied a petition to rehear (R. 215), and this Court had previously, on June 2, 1942, denied a petition for Writ of Certiorari to the Court of Appeals of Tennessee (R. 214), in a written opinion (R. 200). The Court of Appeals rendered its opinion and judgment on December 13, 1941, (R. 116). A petition to rehear had been filed in the Court of Appeals on December 23, 1941, (R. 143), which was denied, February 20, 1942. (R. 142).

The petition for Writ of Certiorari was filed in due time on April 4, 1942, and was denied with the results as stated.

The action of these Courts was to affirm a judgment (decree) of the Chancery Court of Shelby rendered May 10, 1941, which appears in the record (R. 55), following the opinion of that Court, (R. 45). The decree permanently disbarred the petitioner from the practice of law in Tennessee.

Petitioner appealed to the Court of Appeals from this judgment and assigned numerous errors. The Court of Appeals affirmed the Chancery decree. And a petition

for Certiorari was filed and assigned numerous errors.

The Federal questions are based on assignments of error in the Supreme Court No. 1. (R. 92) No. 2. (R.93) and No. 5. (R. 110) and in the Court of Appeals No. 1 (R. 162) No. 2 (R. 167) and No. 6 (R. 182), being the same Federal question in both cases.

The procedure under Tennessee statutes is that where a Certiorari is denied by the Supreme Court, the record is returned and lodged with the Court of Appeals. However, the Clerk of the Supreme Court at Jackson, Tenn., serves as Clerk of the Court of Appeals, Mr. J. E. Springbett. (22 Tenn. Appl. Rep. 5 175 Tenn. 6). His title is simply, Clerk of the Supreme Court, Jackson, Tenn. To avoid technical objection, petitioner prays for Certiorari to both Courts.

Tennessee Supreme Court Rule II allows 45 days for filing petition for Certiorari from Court of Appeals. 173 Tenn. 872. Under Rule 32, petition for rehearing may be filed within 10 days from date opinion is announced. 173 Tenn. 886. Opinion in Court of Appeals was rendered December 23, 1941, (R. 143), denied February 20, 1942. Petition for Writ of Certiorari filed in Supreme Court of Tennessee April 4, 1942, (R. 148). Petition for Certiorari was denied (R. 214) in written opinion (R. 200), and three petitions for rehearing were filed and refused as heretofore stated, the last being refused September 8, 1942, (R. 217). Stay of execution for a period of sixty days as per certified copy at the end of transcript filed November 30, 1942.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding commenced by motion and citation of Chancellors John E. Swepston and Lois D. Bejach, Chancellors of the Chancery Court of Shelby County, Tennessee, sitting jointly, upon recommendation of J. S. Allen, Edward P. Russell and Clarence E. Clifton, formerly appointed by the Court as amici curiae in the cause entitled J. O. Bomer, Jr., vs. William Gerber, No. 44633, R. D., of said Chancery Court; requiring the said J. O. Bomer, Jr., to appear and show cause why he should not be disbarred from the practice of law. (R. 2-10).

The charges in said citation are summerized as follows:

> "That in the filing of said disbarment proceedings by J. O. Bomer, Jr., against Marion S. Boyd and William Gerber he was guilty of making a number of false and scandalous statements concerning the defendant in those proceedings maliciously and without adequate, or, in fact, any semblance of a real investigation, and of instituting said disbarment proceedings without just grounds and with the improper motives above mentioned." (R. 6).

The motion objecting to the Judges and for transfer of the case having been overruled and the exceptions taken, the defendant thereupon on the same day filed his answer to said citation denying all the charges and avering that he was justified in filing the suits to disbar Boyd and Gerber (R. 28-37).

On the day of the trial an amendment to said answer was filed setting up defendant's right to freedom of speech and writing as guaranteed to him by the Consti-

tution of the United States and of the State of Tennessee (R. 44).

The cause was tried on oral testimony and the records and the documents introduced in open Court before said two Chancellors whose jurisdiction had previously been objected to whereupon the Court at the conclusion of the evidence and argument of counsel immediately rendered an opinion permanently disbarring the defendant from the practive of law in Tennessee solely on the ground of the filing of the bills for disbarment against Marion S. Boyd and William Gerbervitch, alias, Gerber. Opinion (R. 45-54) and final decree (R. 55-57). Bill against Marion S. Boyd (R. 240-246). Bill against William Gerbervitch, alias, Gerber (R. 267-274). Said finding of fact and opinion of the Chancellor was affirmed by the Court of Appeals and by the Supreme Court of Tennessee.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is based on the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor to deny to any person within its jurisdiction equal protection of laws.

The Supreme Court of Tennessee is the highest Court of that State as set forth in Art. VI. Sec. I. of Constitution of Tenn., 1870.

SPECIFICATIONS OF ERRORS ON THE QUESTIONS PRESENTED

Your Petitioner submits that the Court of Appeals and the Supreme Court of Tennessee were in error in the following respects:

I.

The Courts erred in not holding void the action and order of Chancellor John E. Swepston, Chancellor of the First Division of the Chancery Court of Shelby County, Tennessee, and the Chancellor Lois D. Bejach of the Second Division of said Court in presiding together as one Court and issuing the citation for defendant, Bomer to appear and show cause if any, why he should not be disbarred from the practice of law in Tennessee.

This was error because there is no law under the Constitution of Tennessee nor any legislative enactment thereunder authorizing two Chancellors to constitute one Court and as such entered decrees and orders in any cause as was done in this instance, and especially before the return day of process and when defendant was not before the Court.

Defendant was therefore denied the due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States (R. 2-10 and R. 24). Assignments of Error in Court of Appeals. (R. 92).

Assignment of Error in petition for Certiorari (R. 62)

II.

The Court erred in affirming and not reversing the

decree of the Court of Appeals and the Chancery Court and dismissing the case, because the decree of the two Circuit Judges presiding as one Court as Chancellors in the place and stead of Chancellor Swepston and Bejach, under the void order of the two Chancellors, was void, because there is no law in Tennessee authorizing two Judges either Circuit or Chancery to preside and make decisions as one Court.

Defendant was therefore deprived of trial before a legal Court and the due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. (R. 2-10 and R.24). Assignments of Error in Court of Appeals. (R. 92). Assignments of Error in petition for Certiorari (R. 62).

III.

The Court erred in affirming and not reversing the judgment (decree) of the Chancery Court of Shelby County, Tennessee, and the Court of Appeals of Tennessee affirming same, because the Trial Court erred in not requiring E. H. Crump, a witness, subpoenaed by defendant to testify and whose attorney had accepted service (Sheriff failing to serve same), and assured the Court at the beginning of the trial that the witness would appear, and then after the trial had been in progress for about three days on oral testimony, said witness' name was called so that he could be required to testify in open Court, the witness did not appear, but his attorney, Mr. Frank Gailor, stated that owing to a recent death of one of witnesses relatives, and it also being the anniversary of the death of his son, witness was not present, but if the Court would indulge him he would arrange for the

deposition of the witness to be taken. Defendant's attorney objected to the taking of the deposition. Thereupon the Court inquired of defendant's counsel what he expected to prove by the witness, counsel replied that he did not think the Court should require him to state in advance what he wished to prove by the witness, whereupon the Court declined to require the witness to be present and denied defendant the opportunity of having the testimony of the witness. To all of which ruling defendant objected and excepted for the reasons stated. (R. 70 and R. 80 et seq.) Assignment of Error in Court of Appeals (R. 110) in Supreme Court (R. 183).

This was error because defendant was thereby denied due process of law guaranteed to him by the Fourteenth Amendment, Constitution of the United States.

These holdings were vital, and determinative of the case.

A STUDY OF THE COURT OF APPEALS OPINION

The opinion of the Court of Appeals R. 119 states that the question was raised that the defendant had no opportunity to object to the order of interchange at the time same was made, but nowhere in the opinion in any way answers this denial of due process of law. And the Court further expressly states that the only ground of the affidavit that the Judges were honorary member of the Bar Association when there is additional ground that the cause should have been transferred when the enterchange of Judges was entered (R. 26). And nothing is said about the order being void (R. 119) as it clearly was

as the act of two Judges on a one Judge bench is void.

The opinion of the Court of Appeals relative to the failure of the lower Court to have the witness, E. H. Crump testify merely takes the position that after Mr. Crump's attorney made the promise at the beginning of the trial that Mr. Crump would appear and without any change of circumstances when he was later called to testify on this representation of counsel in open Court, Mr. Gailor, Mr. Crump's counsel, stated that he was not present and the Court held that this was not error for no apparent reason, all in violation of defendant's constitutional rights of due process of law.

A STUDY OF THE SUPREME COURT OPINION

The Supreme Court in its opinion at least does face the questions presented and relative to the lack of notice states that the law does not provide that notice shall be given to the litigant of the interchange of Judges. (R.203). But the opinion does not undertake to say that the Fourteenth Amendment of the United States is not applicable.

Relative to two Judges sitting on a one Judge bench the Supreme Court merely states that either Chancellor would have had the right to enter the order of citation and the fact that it was entered by them jointly in no ways jeopardized the rights and interest of the defendant. Either of the Circuit Judges was qualified under the Code to try the cause by interchange, and the fact that two heard the case does not affect the merits of the consequences (R. 204). The fact that two Judges sat on one man bench and decided all the points jointly and entered final

orders signing them jointly without Constitutional or Legislative authority, all in violation in due process of law was brushed aside by this remark, nothwithstanding the Fourteenth Amendment of the Constitution of the United States.

Relative to the witness, Crump not appearing, the Court based its opinion upon the proposition that a disbarment case in Tennessee is not a criminal case and therefore defendant was not entitled to have a witness in open Court, although defendant was entitled to try his case on oral testimony and have all other witnesses, but Mr. Crump, in open Court, therefore defendant and petitioner herein was denied due process of law under the Fourteenth Amendment to the Constitution of the United States.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the Court of Appeals, and the Supreme Court of Tennessee, which presents the questions, and presents his brief for consideration with his petition.

We have no dispute on the facts, but only as to conclusions therefrom, and the law. The opinion of the Tennessee Courts is conclusive on the facts. Hence the transcript omits the testimony in the case, and is adequate to present the Federal questions involved.

Wherefore, your petitioner prays that a Writ of Certiorari may be issued out of and under the seal of this Court to the Court of Appeals, and the Supreme Court of Tennessee, commanding said courts to certify and send

to this Court on a day certain to be designated a certified trnscript of the case, entitled there, J. O. Bomer, Jr., vs State of Tennessee, on motion of Chancellor John E. Swepston and Chancellor Lois D. Bejach, to end that said case may be reviewed and determined by this Court, and that petitioner may have such relief as this Court may deem proper, lawful and equitable, and that the opinion and judgment of the Courts, the Court of Appeals and the Supreme Court and the Chancery Court of Shelby County, Tennessee, may be reversed, and the case dismissed or remanded for further hearing in accordance with the directions of this Court.

Respectfully Submitted,

J. O. BOMER, JR.,
Petitioner.